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19 UNITED STATES DISTRICT COURT  
20 NORTHERN DISTRICT OF CALIFORNIA  
21 SAN FRANCISCO DIVISION

22 ORACLE AMERICA, INC.,

23 Plaintiff,

24 v.

25 GOOGLE INC.,

26 Defendant.

27 Case No. 3:10-cv-03561 WHA

28 **PLAINTIFF'S OBJECTION TO  
DEFENDANT'S NOTICE RE EXPERT  
WITNESS CHANGE OF AFFILIATION**

1 Oracle America, Inc. (“Oracle”) submits this Objection to the Notice re Expert Witness  
 2 Change of Affiliation (the “Notice”) filed by Defendant Google LLC (“Google”) on November  
 3 25, 2019 (Dkt. 2143). The Notice informed Oracle and the Court that Google’s expert witness  
 4 Dr. Gregory K. Leonard intended to affiliate with Charles River Associates (“CRA”), the same  
 5 firm with which Dr. James R. Kearl, the FED. R. EVID. 706 expert appointed by the Court, is  
 6 affiliated. Google did not bring this matter to Oracle’s attention before filing the Notice, and the  
 7 ECF notice of filing was the first time that Oracle learned that Dr. Leonard would join CRA.  
 8 Oracle objects to Dr. Leonard’s continued involvement in this matter.

9 Given the Court’s retention of Dr. Kearl and thereby CRA, CRA is serving as an agent of  
 10 the Court. The shared affiliation of Google’s witness and the Court’s agent is highly prejudicial  
 11 to Oracle and leads to an appearance of bias. At a minimum, the affiliation suggests to the jury  
 12 and the public that Dr. Kearl is not truly independent. At worst, it suggests that Google and the  
 13 Court are aligned. Additionally, Google’s payment of fees and expenses to CRA for work  
 14 performed by Dr. Leonard and his team would constitute payments by one of the parties to an  
 15 agent of the Court. Such payments would appear to be grossly improper.

16 The Court has already established strict rules for communications between Dr. Kearl, his  
 17 assistants and the parties. “Neither party may make *ex parte* substantive communications with  
 18 [Dr. Kearl’s attorney John L. Cooper], Dr. Kearl, or his assistants, including communications  
 19 regarding Dr. Kearl’s role in the case, any witness or expert testimony, or any expert reports.”  
 20 (Dkt. No. 1395, ¶6) All written and verbal communications between Dr. Kearl, his assistants or  
 21 his attorney must include at least one attorney of record from each side. *Id.* Indeed, Dr. Kearl  
 22 and his assistants are forbidden from communicating directly with the parties, instead all  
 23 communications must be conducted through Attorney Cooper. (Dkt. No. 1395, ¶11). These strict  
 24 requirements, akin to an ethical wall, were imposed when there was no affiliation between Dr.  
 25 Kearl and any party expert. Now that Dr. Leonard has chosen to affiliate with CRA, even these  
 26 requirements are insufficient to protect Oracle’s interests. An ethical wall, as proposed by  
 27 Google, cannot cure this impropriety. Having both expert economist teams housed within the  
 28 same firm presents numerous opportunities for improper sharing of information that a wall likely

1 cannot guard against in this case. Regardless, a wall cannot cure the appearance of impropriety of  
2 having Google's expert and the Court's expert aligned at (and paid through) one expert shop.

3 Oracle intends to move to disqualify Dr. Leonard, and possibly Dr. Kearl and CRA, at the  
4 first appropriate opportunity when proceedings resume before this Court.

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6 Dated: January 15, 2020

Respectfully submitted,

7  
8 ORRICK, HERRINGTON &  
9 SUTCLIFFE LLP

10 By: /s/ Annette L. Hurst  
11 ANNETTE L. HURST

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